BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CLARENCE L. HORTON	)
Claimant	)
VS.	)
	) Docket Nos. 220,167 & 220,168
BOB'S SUPER SAVER COUNTRY MART	)
CADWELL'S COUNTRY MART	)
Respondents	)
AND	)
	)
CRUM & FORSTER INSURANCE COMPANY	)
UNITED STATES FIRE INSURANCE	)
NORTH RIVER INSURANCE COMPANY	)
Insurance Carriers	)

ORDER

Claimant and respondent Cadwell's Country Mart appeal from an Award entered by Administrative Law Judge John D. Clark on March 10, 1998. The Appeals Board heard oral argument October 28, 1998.

APPEARANCES

Charles W. Hess of Wichita, Kansas, appeared on behalf of claimant. Douglas C. Hobbs of Wichita, Kansas, appeared on behalf of respondent Bob's Super Saver Country Mart and its insurance carriers Crum & Forster Insurance Company and United States Fire Insurance Company. John S. Seeber of Wichita, Kansas, appeared on behalf of respondent Cadwell's Country Mart and its insurance carrier North River Insurance Company.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

This appeal involves two claims consolidated for trial. The first, Docket No. 220,167, is against Bob's Super Saver Country Mart (Super Saver) for an accident on April 10, 1996. The second, Docket No. 220,168, is against Cadwell's Country Mart (Cadwell) for an accident on December 4, 1996. Both allege injury to claimant's low back.

The Administrative Law Judge (ALJ) found that claimant did not suffer permanent injury from the first accident. For the second accident, the ALJ found claimant proved a 91.5 percent permanent partial work disability. The ALJ reduced the award for the second accident by 5 percent for preexisting disability and awarded benefits based on an 86.5 percent permanent partial general disability.

On appeal, claimant contends that he has a 5 percent permanent disability from the first accident and a permanent total disability as a result of the second accident. He also asks for a finding as to average weekly wage for each date of accident. As an alternative argument, claimant argues that if claimant did not have permanent disability from the first accident, the ALJ erred by reducing the award on the second accident for preexisting disability.

Respondent Cadwell argues that the work disability award should be for the first accident, the accident of April 10, 1996, while claimant was working for Super Saver. Cadwell also disagrees with claimant's contentions regarding average weekly wage. Finally, Cadwell argues that claimant has not made a good faith effort to find employment after he left work for respondent Cadwell and for that reason should not be awarded work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
Docket No. 220,167

After reviewing the record and considering the arguments, the Appeals Board finds claimant has a 5 percent permanent partial disability based on functional impairment for the accident of April 10, 1996.

Findings of Fact
Docket No. 220,167

1. Claimant worked as a meat cutter and market manager for Super Saver.

2. On April 10, 1996, while working for Super Saver, claimant fell backwards, striking his right hip on a pallet, as he picked up a 100-pound box of meat.

3. Claimant initially treated with his family physician, Dr. Scott A. Ellis. On April 16, 1996, the date of the first visit after the injury, Dr. Ellis diagnosed lumbar strain with right sciatica. Straight leg raising was negative bilaterally and deep tendon reflexes were equal bilaterally. But claimant complained of pain in the right buttock and was tender at the area of the sciatic nerve on the right buttock.

Dr. Ellis next saw claimant April 30, 1996. At this time, claimant complained of pain running down his right leg and straight leg raising was positive on the right. X-rays showed narrowing between L5 and S1 and Dr. Ellis ordered an MRI.

The MRI showed bulging discs at L3-L4 as well as L4-L5. But there was no evidence of frank herniation.

By the time Dr. Ellis next examined claimant on May 21, 1996, claimant had undergone recommended physical therapy and the hip, back, and leg pain had all subsided. Dr. Ellis released claimant from his care at this time.

Claimant nevertheless returned to Dr. Ellis on October 10, 1996, to discuss his back problems. Dr. Ellis noted a "fairly good ROM of his back" and told claimant that if he was considering disability he should see the company doctor.

Dr. Ellis did not provide a disability rating. He testified he does not rate impairment. Claimant testified Dr. Ellis told him he should not lift more than 25 pounds. But Dr. Ellis testified he did not recommend restrictions. The Board resolves this conflict in favor of the testimony by Dr. Ellis and concludes claimant did not have permanent restrictions when he returned to work for Super Saver.

4. Claimant did not miss work, except for doctor's appointments, following the April 10, 1996, accident, but respondent did change claimant's duties. In November 1996, Cadwell purchased Super Saver. In September 1996, before the transfer of ownership, Super Saver moved claimant from its Parson's store to its store in Independence, Kansas. At the same time respondent moved claimant from the position he held as market manager to a job as a meat cutter. The change in position resulted in a change in base pay. At the time of the April 1996 injury, the base pay was $575 per week. The base pay increased and at the time of the job change claimant was earning a base pay of $590 per week. The base pay in the new position was $11 per hour or $440 per week.

5. On December 4, 1996, while working for the new owner, Cadwell, claimant suffered a second accidental injury to his low back. Dr. Philip Mills, one of the treating physicians after the second accident, testified as to the nature and extent of disability resulting from the first accident of April 10, 1996.

6. Dr. Mills concluded that the second accident, the accident on December 4, 1996, resulted in an increase in claimant's permanent impairment. He rated the total functional impairment as 15 percent of the whole body. He initially apportioned this rating as 50 percent for each injury, but he changed his opinion and assigned a 5 percent permanent partial impairment of function to the April 10, 1996, injury, with the remaining 10 percent attributable to the December 4, 1996, injury.

7. Although Dr. Mills concluded the December 4, 1996, accident permanently worsened claimant's back, Dr. Mills testified he probably would have restricted claimant from lifting more than 35 pounds before the December 4, 1996, accident.

8. Claimant testified that the back symptoms were significantly worse after the December 4, 1996, injury. According to claimant, the pain went into the hip after the first injury. After the second accident the pain went all the way down his right leg into his foot.

9. Dr. Eugene E. Kaufman also examined claimant after the December 4, 1996, injury. As was the case with Dr. Mills, Dr. Kaufman expressed an opinion regarding the April 10, 1996, injury. Dr. Kaufman saw claimant December 10, 1997. He rated the functional impairment at that time as 5 percent. He testified that he did not think the injury had changed much from the first to the second but acknowledged he had not seen claimant until after the second accident so it was difficult for him to say.

Conclusions of Law
Docket No. 220,167

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 1996 Supp. 44-501(a).

2. The Board finds, based on the testimony of Dr. Mills and the testimony of claimant, that claimant has a 5 percent permanent partial disability in Docket No. 220,167 for the accident of April 10, 1996. K.S.A. 1996 Supp. 44-510e.

3. Claimant's average weekly wage at the time of the April 10, 1996, accident was sufficient to warrant the maximum weekly benefit of $326. His base pay was $575 and that pay alone would warrant the maximum benefit. Claimant makes no claim for work disability on this accident and, except to find that the wage is high enough for the maximum weekly benefit, it is unnecessary to find the precise average weekly wage.

AWARD
Docket No. 220,167

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark on March 10, 1998, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Clarence L. Horton, and against the respondent, Bob's Super Saver Country Mart, and its insurance carriers, Crum & Forster Insurance Company and United States Fire Insurance, for an accidental injury which occurred April 10, 1996, for 20.75 weeks at the rate of $326 per week or $6,764.50 for a 5% permanent partial disability, all of which is presently due and owing in one lump sum, less amounts previously paid.

Claimant is awarded temporary total disability and medical benefits previously paid. Claimant is also awarded up to $500 in unauthorized medical expenses upon presentation of proper proof of the expenses.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
Docket No. 220,168

After reviewing the record and considering the arguments, the Board finds claimant has proven he has a permanent total disability from the accident of December 4, 1996.

Findings of Fact
Docket No. 220,168

1. As part of the findings in Docket No. 220,168, the Board incorporates by reference all findings made in Docket No. 220,167.

2. On December 4, 1996, claimant injured his low back when he slipped on a piece of meat. His feet went out from under him and he landed on his right hip. Following this accident, claimant had pain radiating down his right leg with numbness in the calves down to the top of his foot. The pain was different than what claimant experienced after the April 10, 1996, accident.

3. Claimant was off work following the injury from December 4, 1996, to February 14, 1997. His then-treating physician released him to light-duty work as of January 30, 1997, but respondent did not have a job for him. Beginning some time in February 1997, respondent made available a part-time, light-duty job and claimant worked approximately 14 hours per week from February 14, 1997, to May 23, 1997.

4. Dr. Mills began treating claimant May 6, 1997, and released claimant with permanent restrictions on August 4, 1997. Dr. Mills recommended restrictions against lifting greater than 10 pounds or standing more than one hour at a time. He limited sitting to 4 to 6 hours per day and restricted claimant against any bending and twisting. He also limited claimant to occasional squatting, climbing, pushing/pulling 25 pounds, reaching overhead, and restricted against working in cold environments.

5. On August 11, 1997, claimant took the permanent restrictions to his employer, Cadwell. Claimant was advised they had no work for him within the restrictions. Claimant thereafter looked for work in the newspaper but found none.

6. Dr. Mills reviewed a list of the tasks claimant had performed at work in the 15 years before the December 4, 1996, injury. He testified claimant can no longer, as a result of the injury, perform 5 of the 6 tasks for an 83 percent loss.

Dr. Mills also testified that claimant is essentially unemployable.

7. Claimant was 61 years old at the time of the continuation of the regular hearing. He completed the 9th grade and has no other formal training or education. Since leaving school in 1952 or 1953, he has worked in the oil fields and as a meat cutter.

8. Mr. Jerry D. Hardin, a vocational expert, evaluated claimant's work history and concluded claimant is totally and permanently unable to obtain or perform substantial gainful employment.

9. The Board finds the December 4, 1996, accident permanently worsened claimant's back injury.

10. The Board concludes, based on testimony by Dr. Mills, Jerry Hardin, and the claimant, that claimant is, as a result of the December 4, 1996, accident, essentially and realistically unemployable.

Conclusions of Law
Docket No. 220,168

1. A person is permanently totally disabled under the Workers Compensation Act if he/she is essentially and realistically unemployable. *Wardlow v. ANR Fright System*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

2. Based on the testimony of Dr. Mills and Mr. Jerry Hardin, as well as the testimony by claimant, the Board concludes claimant is permanently totally disabled. K.S.A. 44-510c.

3. The Board finds that claimant's average weekly wage at the time of this accident was $440. Although the record shows claimant earned overtime when he switched to the meat cutter position while employed by Super Saver, there is no evidence that he earned overtime while at Cadwell. Claimant contends he received insurance benefits while at Cadwell but the record does not support this assertion. Claimant was told he would but apparently this was not by anyone with authority to make such a representation.

4. K.S.A. 44-501(c) requires that any award of compensation be reduced by the amount of functional impairment determined to be preexisting. As found above, claimant had a preexisting impairment of 5 percent. A permanent total disability differs from a 100 percent permanent partial disability. A permanent total disability pays benefits of $125,000 at a weekly compensation rate based on the calculation set forth in K.S.A. 44-510c. A 100 percent disability, on the other hand, would pay the weekly compensation rate for 415 weeks, but not to exceed $100,000. K.S.A. 1996 Supp. 44-510e. As a result, one cannot deduct the percentage of impairment in exactly the same way one would with a permanent partial disability. One cannot deduct the percentage of preexisting disability from the percentage of disability found. The Board concludes, however, that the logical alternative is to deduct the number of weeks represented by

the preexisting disability, in this case 20.75 weeks for a 5 percent disability, from the number of weeks of benefits to be paid for the permanent total disability. In this case, the permanent total disability would be paid at $293.35 per week for 23.14 weeks of temporary total disability and 402.97 weeks of permanent disability for a total of $125,000. With the 20.75 weeks deducted, the award in this case is for 23.14 weeks of temporary total disability at $293.35 per week and 382.22 weeks (402.97 - 20.75 = 382.22) of permanent total disability at $293.35 per week for a total award of $118,912.36.

AWARD
Docket No. 220,168

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Clarence L. Horton, and against the respondent, Cadwell's Country Mart, and its insurance carrier, North River Insurance Company, for an accidental injury which occurred December 4, 1996, for 23.14 weeks of temporary total disability compensation at the rate of $293.35 per week or $6,788.12, followed by 382.22 weeks of permanent total disability payments at the rate of $293.35 per week or $112,124.24, for a total award of $118,912.36.

As of May 15, 1999, there is due and owing claimant 23.14 weeks of temporary total disability compensation at the rate of $293.35 per week or $6,788.12, followed by 104.29 weeks of permanent total disability compensation at the rate of $293.35 per week in the sum of $30,593.47, for a total of $37,381.59 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $81,530.77 is to be paid for 277.93 weeks at the rate of $293.35 per week, until fully paid or further order of the Director.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of April 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Charles W. Hess, Wichita, KS
Douglas C. Hobbs, Wichita, KS
John S. Seeber, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director